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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

NO. 263

WAYNE K. PATTERSON, Warden of the Colorado State Reformatory, and HARRY C. TINSLEY, Warden of the Colorado State Penitentiary,
Petitioners,

vs.

ELLSWORTH MEDBERRY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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TO: The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioners respectfully pray that this Honorable Court issue a writ of certiorari to review the judgment and order of the United States Court of Appeals, Tenth Circuit, (which affirmed a judgment of the United States District Court for the District of Colorado) by which

respondent's claims of denial of constitutional rights were upheld and the State of Colorado was given the choice of: (1) releasing one who was convicted of murder and sentenced to life imprisonment twenty-one years ago (and who had already had such conviction and sentence affirmed by the Colorado Supreme Court); (2) affording such convict a new trial; (3) providing such convict with a free transcript (held in the same opinion to be non-existent) or other means of securing a new and adequate appellate review.

OPINIONS BELOW

The relative opinion of the United States District Court was handed down on August 31, 1960, and is reported in 188 F. Supp. 557. The Circuit Court of Appeals' affirmance of that opinion was announced on May 4, 1961, and it is relative to that affirmance that this certiorari is now being sought. A copy of each of these two opinions is attached herewith as Exhibits A and B, respectively.

Other reported opinions of Medberry's various actions in federal and state courts which are referred to below may be found as follows: *Medberry v. People*, 107 Colo. 15, 108 P. (2d) 243; *Medberry v. Patterson*, 142 Colo. 180, 350 P. (2d) 571; *Medberry v. Patterson*, 174 F. Supp. 720.

JURISDICTION

As previously mentioned, the opinion of the United States Court of Appeals, Tenth Circuit, sought to be reviewed was handed down on May 4, 1961. The statutory provision believed to confer on this court jurisdiction to review the judgment by certiorari is 28 USCA §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. How broad is the Griffin doctrine:?

A. Does a state's failure to provide a free transcript to an assertedly indigent convict entitle such convict to relief when his only request for such was made prior to the state's first learning of its duties regarding free transcripts through the announcement of the *Griffin* decision?

B. Does the Griffin doctrine in any way afford relief to one who is willing and able to buy a transcript but which the state is unable to sell because it does not exist?

II. Can a state prisoner who has ignored established procedures (by refusing to seek certiorari in the United States Supreme Court of a State Supreme Court decision and also by refusing to abide by established state procedure required of one seeking a free transcript) be said to have exhausted state remedies for the purpose of being entitled to habeas corpus relief in the federal courts?

III. Does a federal court have the authority to order a state court to completely disregard its own established procedure (which could be used to afford the same relief decreed by the federal court) and order that such relief be sought in the state courts in a manner unknown to that state's judicial system?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions here involved are the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States:

> "* * * nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

An excellent narrative of the important relative facts surrounding the actual murder of which Medberry has been convicted, and of some of the events that have taken place since the conviction, may be found in the opinion of Judge Arraj handed down on the second of Medberry's three appearances in the Federal District Court and recorded in 174 F. Supp. 720, 722-723. However, to fully outline the events of this case, including the most recent court actions, we present herewith this chronological summary for the court's reference:

July 31, 1939 — Medberry was sentenced by the District Court of Washington County, Colorado, to life imprisonment for first degree murder. *Medberry v. People*, 107 Colo. 15, 17, 108 P. (2d) 243;

October 26, 1939 — Washington County District Court found Medberry and his family to be destitute of money or property (ff. 407-408, Colorado Supreme Court record, No. 14706);

December 7, 1939 — Medberry's petition for a free transcript of the trial proceedings was denied by the Washington County District Court (ff. 426-433, Colorado Supreme Court Record, No. 14706);

December 2, 1940 — The Colorado Supreme Court affirmed petitioner's conviction. No certiorari from the United States Supreme Court regarding this Colorado Supreme Court decision has ever been sought. *Medberry v. People*, 107 Colo. 15, 108 P. (2d) 243;

May 28, 1956—*Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. ed. 891, became final and stood for the proposition that an indigent convict cannot be precluded from his right to appeal in the state courts because of lack of funds to purchase a transcript;

December, 1956 - January, 1957 — Medberry corresponded with the clerk of the District Court of Washington County and asked for and offered to pay for a transcript. The clerk replied that she thought one was made at the time of the first appeal and another one could not be made from the records she had (pp. 58, 59, 122, 136, 146);

August 5, 1958 — The Assistant Attorney General who was then handling the Medberry case was advised by the Clerk of Washington County District Court that the court reporter for the case had died many years ago and her notes were not in the court file and it was doubtful if they could be transcribed if found because of the unusual system of shorthand used by the reporter (p. 60);

August 13, 1958—United States District Court denied petitioner's petition for habeas corpus (p. 63);

September 18, 1958 — An original petition for habeas corpus filed by petitioner in the Colorado Supreme Court was denied (p. 64);

January 12, 1959 — United States Supreme Court denied certiorari of the Colorado Supreme Court's September 18, 1958, denial of petitioner's habeas corpus petition (p. 64);

April 14, 1959 — United States District Court again denied petitioner's petition for habeas corpus (p. 64, *Medberry v. Patterson*, 174 F. Supp. 720);

June 26, 1959—A petition for habeas corpus was filed by petitioner in the District Court of Washington County and was later denied (p. 64, f. 69 of Colorado Supreme Court Record No. 19166);

March 14, 1960 — The Washington County District Court's denial of habeas corpus was affirmed by the Colorado Supreme Court. No certiorari relative to this Colorado Supreme Court affirmance has ever been sought in the United States Supreme Court (p. 64, Medberry v. Patterson, *142* Colo. *180*, 350 P. (2d) 571);

August 31, 1960 — In response to another petition for habeas corpus filed in the United States District Court, Judge Arraj of that court ordered that "within eight months from the date of this order the petitioner shall be accorded one of the following three alternatives:

(1) He shall be provided with a transcript (including the testimony adduced at the trial)or other adequate means of appeal and be granted an appeal based thereon, or

(2) He shall be given a new trial, or

(3) Failing both of the above, he shal be discharged from custody by the respondents." (pp. 75-76)

November 16, 1960 — Respondents filed in the United States District Court a Motion for Stay and Rehearing Based on Newly discovered Evidence. This motion was never heard but was transmitted to the U. S. Court of Appeals as a Supplemental part of the record;

May 4, 1961 — The United States Court of Apeals, Tenth Circuit, affirmed Judge Arraj's District Court opinion of August 31, 1960, and left Colorado with the identical three alternatives mentioned above, to be carried out within six months of May 4, 1961.

REASONS FOR GRANTING THE WRIT

In 1939 Medberry was convicted of first degree murder and sentenced to life imprisonment in Colorado. At that time, he admitted, and he has never denied, the basic circumstances which involved him in the crime. The only questions he has occasionally raised since the trial relative to the facts of the incident have related basically to whether the killing was intentional or accidental. Now the United States Circuit Court of Appeals has affirmed a United States District Court order which may obligate the State of Colorado to nullify the trial of this convicted killer and turn him loose upon society. The federal courts' views were based upon their interpretation of this Court's opinion in the famous case of *Griffin v. Illinois*, 351 U. S. 12, 76 S. Ct. 585, 100 L. ed 891. It is the position of the State of Colorado that the *Griffin* decision does not require the result reached by the United States District Court and the United States Court of Appeals, and we sincerely urge that this Court give full consideration to each of the issues here involved. We will therefore list the

questions presented by this case and outline briefly our position on each of them.

I

HOW BROAD IS THE GRIFFIN DOCTRINE?

Basically, the federal courts which have heard this case, have held that Medberry's rights under the Fourteenth Amendment to the United States Constitution were violated because the State of Colorado did not provide him with a free transcript in order that he might have an adequate appellate review. It is our position that the important questions involving when and by what method Medberry requested his free transcript, and whether or not he was indigent at the time of his request, and whether or not the transcript existed at the time of his request, were all handled inadequately or improperly by the lower courts. For this reason, and in view of other similar cases that have already arisen in other states and will, no doubt, continue to arise, we believe this Court's reconsideration and re-definition of the Griffin doctrine at this time would be most appropriate.

A. Does a state's failure to provide a free transcript to an assertedly indigent convict entitle such convict to relief when his only request for such was made prior to the state's first learning of its duties regarding free transcripts through the announcement of the *Griffin* decision?

Nowhere in either the *Griffin* case, supra, or in *Eskridge v. Washington*, 357 U. S. 214, 2 L. Ed. (2d) 1269, 78 S. Ct. 1061, both of which cases were heavily relied upon by Medberry, is there any indication that the state

has any duty to volunteer a free transcript to an indigent convict who might want one for an appeal. We may, then, start with the basic proposition that Medberry was required to ask the state for a transcript before he could claim violation of any constitutional rights because of not being provided with one. What, then, if anything, has Medberry done about asking the state for a free transcript? The only request Medberry ever made was in 1940, immediately after trial. Griffin, of course, was not decided until 1956, and we may say, as did the Federal District Court Judge in one of the Medberry opinions, that back in 1940 certainly "no one knew or could have known" that the state would ever have a duty to provide free transcripts to indigent convicts. It is, therefore, our position that the request in 1940, in itself, entitles Medberry to no relief.

The next question which logically presents itself is what Medberry has done since the *Griffin* decision of 1956 in the way of requesting a free transcript from the State of Colorado. The answer is, of course, as can be seen by our statement of the case, that he has never since 1956 gone into any court and presented any petition under the procedure required by Colorado state law for a free transcript. He has written to the clerk of the trial court and been advised that the reporter who took the trial was dead, the whereabouts of her notes unknown, and the possibility of obtaining a transcript extremely doubtful. It is our position that the letters to the clerk of the court are a complete nullity in considering whether or not Medberry has exhausted his state remedies.

In re Patterson, 136 Colo. 401, 317 P. (2d) 1041, out-

lined the hardly unreasonable procedure required of any person seeking a free transcript in Colorado. Medberry has refused to follow that procedure, but, instead, has brought numerous writs of habeas corpus in the Colorado state courts and in the federal courts urging that he should be set free because Colorado did not give him a transcript back in 1940 when he did ask for one, but admittedly prior to the time that Colorado knew of their possible duty to give him one. Each time Medberry has attempted to gain relief by habeas corpus in the Colorado state courts he has been told, in effect, that habeas corpus is not the proper method by which to seek a free transcript in Colorado. Even the Federal District Court judge who heard the case at one time, *Medberry v. Patterson*, 174 F. Supp. 720, referred Medberry to *In re Patterson*, supra, which outlines the necessity of filing a petition for a free transcript in the state district court where the relative criminal trial was held. This procedure is the same as that followed by Griffin in the case upon which Medberry so heavily relies (and also in *Berman*, infra). Medberry has claimed that, since he had learned from the court reporter a transcript was probably unavailable, he was thereby relieved of the duty of petitioning for one. However, in Griffin the convict there could not have been much more sure that he was not going to get a free transcript if he asked for one. Illinois statutes in effect at the time forbade the granting of a free transcript to one in Griffin's position. Yet Griffin still petitioned for one and, when such was denied, gained his relief by seeking certiorari of that point in this Court. Medberry should have done likewise. Medberry, of course, pointed out in the lower federal courts that he relies not only upon *Griffin*, but also upon *Eskridge*, supra. In *Eskridge*, however, although no new request for a transcript was made after the announcement

by this Court of the Griffin doctrine, and although the petitioner there sought relief in the state courts by habeas corpus, as did Medberry, yet there is a factor in that case which quite distinguishes it from Medberry. It is obvious from reading that opinion that in the State of Washington a free transcript may be requested through a petition for habeas corpus. At least the opinion shows that, when Eskridge filed his petition for habeas corpus in the state courts of Washington, the matter of giving him a free transcript at that time was certainly considered:

> "In this court the state does not deny * * * the necessity for him to have some record of the proceedings in order to prosecute his appeal properly * * * the Washington courts appear to have proceeded on the assumption that he could not effectively prosecute his appeal unless the motion for a free transcript was granted."

How different is our own case, where Medberry was told, in effect, that habeas corpus is not the proper remedy for seeking a transcript in Colorado, and another method suggested for seeking such. *Medberry v. Patterson*, 174 F. Supp. 720; In re Patterson, supra. Throughout the entire record of Medberry's many court actions, one point stands out. COLORADO HAS NEVER, SINCE THE *GRIFFIN* DECISION, DENIED MEDBERRY A FREE TRANSCRIPT FOR THE SIMPLE REASON THAT HE HAS NEVER ASKED FOR ONE.

B. Does the Griffin doctrine in any way afford relief to one who is willing and able to buy a transcript but which the state is unable to sell because it does not exist?

Medberry has repeatedly claimed, and the lower federal courts held, that from the record it was clear that there is no transcript of the Medberry trial available in Colorado now, nor has there been for some time in the past. We have never conceded or denied the availability of a transcript, but have stated numerous times that whether or not one is available is unknown, and that if Medberry would properly petition the trial court for a transcript, he would then receive a judicial determination of this all important question. However, it is our position that since Medberry claims, and the lower court found, that it is impossible to give Medberry a free transcript because it does not exist, and since the record shows in the letters Medberry wrote to the clerk of the court since 1956 that he was then willing and able to pay for a transcript, that all of these factors together take the Medberry situation completely out of the facts and doctrine announced in *Griffin* and *Eskridge*. Both those cases obviously proceeded upon the assumption that the transcript was available and that the only reason the convict did not have one was because he was unable to pay for one: "The state concedes that the reporter's transcript from the 1935 trial is still available." *Eskridge v. Washington*, supra. A reading of *Eskridge* and *Griffin* show that apparently this court has never decided whether or not the Fourteenth Amendment requires that the state give relief to a person who is denied a transcript, not because of his poverty, but because the transcript is non-existent and unavailable. Several opinions from other states and one from a federal court have also taken this position.

In *United States, ex rel. Westbrook v. Randolph*, 259 F. (2d) 215, 216, 217, a situation somewhat similar to the one at hand existed. There the court reporter, by affidavit, said that:

> "'Affiant further states that shortly after this trial, the affiant became ill, and has been incapacitated continuously since that date, to and including the present; and that, as a result of such incapacity, the affiant has been unable to follow his profession as an Official Court Reporter.
>
> 'Affiant further states that in the confusion of his business affairs as the result of his illness, the shorthand notes above referred to have been misplaced or lost; and that at this date affiant is unable to locate them, and he has no knowledge as to whether they are even in existence, but well and truly believes that said record is lost or destroyed.'"

and the court said:

> "The Griffin case, which is cited and relied on by both parties as well as the district court, involved defendants who were unable to perfect their appeal from conviction in Illinois state courts *because of their financial inability to pay for a transcript of proceedings had in the trial court.* The Supreme Court, with four Justices dissenting, held that the failure of the State of Illinois to furnish an *indigent person* with a transcript essential to perfect an appellate review was a violation of the due process and equal protection clause of the Fourteenth Amendment in view of the fact that Illinois law grants to every person convicted in a criminal trial a right to review by writ of error.

In that case the stenographic notes were available, but, with Griffin having no means to pay for the transcript, Illinois refused to furnish it to him without cost. In this case, Wesbrook's indigency had nothing to do with his failure to obtain the transcript because it was not possible to furnish it to him under any circumstances. In fact, he offered to pay for the transcript in the *first instance*. We have here the unusual situation in which Westbrook has been denied his right of full appeal due to no fault of his own (since he promptly attempted to perfect his appeal), and because of a condition not created by the state and which it is powerless to remedy. . . ."

Certainly, this case well points up the fact that there are important differences between cases where the state refuses a transcript because it does not exist and one where the petitioner is unable to pay for it.

Medberry may, of course, argue that since this *Randolph* case is so similar to his own, he should therefore be given a new trial, the relief afforded in that case. (There, however, the petitioner was remanded to his *trial court* for a new trial, rather than to the state supreme court, for proceedings contrary to established state routine). But, if we look further, we can find another case even more like Medberry's where it has been held that one in his position is entitled to no relief at all. That case is *People v. Berman*,—Ill. —, 169 N. E. (2d) 108, and the reason it is even more like Medberry's is that in it the conviction involved was many, many years old, and the reason the reporter's notes were unavailable was not due to any negligence of a state employee (as in Randolph, where the official court reporter carelessly lost or destroyed the notes while ill), but because under established state procedure at the time

of conviction, no reporter was provided unless the party involved hired his own. We note with interest the following language from that case:

> "In April, 1930, the defendant, Henry Berman, was tried by jury in the criminal court of Cook County for armed robbery, found guilty and sentenced to the penitentiary for a term of one year to life. His oral motion for a new trial was overruled.
>
> * * * * *
>
> * * a defendant in that court who desired to obtain the services of a shorthand reporter personally procured such reporter and paid for his services. It is undisputed that Berman was indigent and had no funds with which to pay for such services.
>
> * * * * *
>
> On February 27, 1957, Berman filed a petition in the criminal court under Rule 65 1 (Ill. Rev. Stat. 1957, chap. 110, par. 101.65-1) in which he requested a free copy of the transcript of proceedings at his trial. Since no such transcript was available, the court denied his petition. * * *
>
> * * * * *
>
> It is defendant's position that the failure of the state to provide a transcript of the proceedings at his trial deprived him of his constitutional right to obtain a proper appellate review of his conviction as required by the United States Supreme Court in Griffin v. People of State of Illinois, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891; that by virtue of the decision in Griffin, every indigent defendant in this State has the right to have furnished to him, free of charge, a com-

plete transcript of the proceedings at his trial regardless of circumstances or conditions and irrespective of the possibility of its obtainment; that failure to furnish such transcript, for whatever reason, requires that defendant be given a new trial, otherwise the guarantees of due process and equal protection of the law of the fourteenth amendment of the United States constitution have been violated.

Defendant argues that the responsibility for lack of availability of transcript rests with the State, since it should have provided a reporter but failed to do so. He relies additionally upon Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U. S. 214, 78 S. Ct. 1061, 2 L. Ed. 2d 1269. • • •

• • • • •

There is nothing in the decision in Griffin which indicates that a defendant must be given a new trial if the transcript of proceedings is unavailable because the trial was unreported. The Supreme Court of the United States was neither required to, nor did it decide that issue in Griffin or in Eskridge.

In Eskridge, the State courts denied an indigent defendant's request for a free transcript of the proceedings in a murder case. Thereafter, Eskridge applied for *habeas corpus* in the Washington Supreme Court charging that the failure to furnish a free transcript violated the due process and equal protection clauses of the fourteenth amendment to the constitution of the United States. His petition was denied without opinion. The United States Supreme Court granted *certiorari* and the opinion which followed held that the failure of the State to furnish Eskridge with

a free transcript was a denial of his constitutional right under the fourteenth amendment. The cause was remanded to the State court for further proceedings consistent with the views expressed in the opinion. *The facts recited in the opinion clearly indicate that the transcript of the trial is still available, though the hearing took place in 1935. Therefore, Eskridge is clearly distinguishable from the case at bar.* * * * *In the case at bar, if Berman had the wealth of the world, he could not purchase a transcript of the proceedings* at his trial since the trial proceeded without the services of a court reporter and no record was made.

Thus, Eskridge does not hold that the principles announced in Griffin must be given uniform application in retrospect or that the result announced either in Griffin or Eskridge is applicable when no transcript is available. The United States Supreme Court has never decided that question.

Meanwhile, we are committed to the policy that the requirements announced by Griffin will be given retroactive effect in those cases where a transcript is available and not in those cases where none can be procured. * * * However, it will not open the prison doors to felons who, through a fortuitous circumstance, find themselves in defendent's position. The fourteenth amendment to the United States constitution, as presently construed, does not command that result." (Latter emphasis ours)

Thus, these two cases together seem to indicate that, if the non-availability of a transcript is due to a state court policy of not providing a court reporter (prior to

the time anybody knew such would be required due to the necessity of furnishing a free transcript to an indigent defendant), the state is not at fault in the sense of owing any relief to a convict who asserts what he claims are his constitutional rights under the subsequently announced *Griffin* decision. On the other hand, if the trial was relatively recent and a new trial is reasonably possible, and the non-availability of a transcript is due to the negligence of the state's employee, then the state owes the person involved at least a new trial.

Since in Medberry's situation the death of the court reporter and the claimed subsequent non-availability of a transcript have in no way been shown to be due to any negligence of the state, our case obviously is comparable to the *Berman* case, where the court ruled that no relief was available to the convict. Thus, if it is true (as claimed by Medberry and held by two federal courts) that no transcript exists at all, the *Berman* ruling would certainly afford an interesting case for comparison with ours.

II.

CAN A STATE PRISONER WHO HAS IGNORED ESTABLISHED PROCEDURES (BY REFUSING TO SEEK CERTIORARI IN THE UNITED STATES SUPREME COURT OF A STATE SUPREME COURT DECISION AND ALSO BY REFUSING TO ABIDE BY ESTABLIHED STATE PROCEDURE REQUIRED OF ONE SEEKING A FREE TRANSCRIPT) BE SAID TO HAVE EXHAUSTED STATE REMEDIES FOR THE PURPOSE OF BEING ENTITLED TO HABEAS CORPUS RELIEF IN THE FEDERAL COURTS?

As can be seen by our statement of the case, no certiorari in the United States Supreme Court has ever been sought of the December 2, 1940, affirmance by the Colorado Supreme Court of Medberry's conviction. That decision also affirmed the propriety of the Colorado state court's denial of Medberry's original petition in that year for a free transcript. It was our position that, since all this occurred prior to the announcement of the *Griffin* doctrine, Medberry of course had no way of knowing that there was even a federal question involved and, understandably, failed to seek certiorari in this court. However, the lower federal courts seem to have now held that Colorado committed some redressable wrong by not giving Medberry that transcript back in 1940. It is therefore now our position that, if Colorado should have known in 1940 that federal constitutional rights required the granting of a free transcript, then Medberry too should be responsible for failing to recognize the federal question in 1940 and be held now to have never exhausted his state remedies by not seeking certiorari in this court at that time.

Again, in 1960 Medberry failed to seek certiorari of the Colorado Supreme Court's affirmance of the local Colorado State District Court's denial of his petition for a writ of habeas corpus. If it is true, as the lower federal courts at first seem to have decided, that that Colorado Supreme Court decision turned on the state ground of habeas corpus being an improper remedy under the circumstances, then of course the failure to seek certiorari of that decision in the United States Supreme Court is understandable. However, the admission that no federal question was ever even considered by the Colorado courts gives even greater substance to our position that Medberry should have been required to properly ask in the state courts for a free transcript so that that federal question would be raised prior to his being admitted to the federal courts and obtaining relief there. The federal court decision which we now seek to have reviewed appears to say that the Colorado courts did decide the federal question of entitlement to a free transcript for purposes of not requiring any further state court actions, but not for purposes of requiring a petition for certiorari of the state decision prior to his seeking habeas corpus relief in the federal courts. We do not understand this inconsistency.

By what logic can Medberry, or anyone else in his circumstances, claim to have exhausted his remedies regarding denial of a free transcript in the state courts when he has never used the procedure outlined by state court decisions for the purpose of implementing the *Griffin* doctrine and providing relief for one in exactly Medberry's circumstances? In *People v. Bragg*, 16 Ill. (2d) 336, 157 N. E. (2d) 57, the Illinois Supreme Court held that even where a convict did properly petition for a free transcript, affidavits to the effect that the reporter had died and her

notes were in a system extremely difficult, if not impossible, for others to transcribe, did not entitle the convict to alternate relief, such as a new trial. In that case, the person was convicted in 1939 and had some alleged trial errors reviewed in 1949. Then in 1956, after *Griffin v. Illinois*, supra, he petitioned for a free transcript. But the reporter had died and had used the relatively unusual Munson system of shorthand. So the case is quite like ours. The Illinois Supreme Court held that before a new trial could even be considered, there would have to be a better showing of an attempt to obtain a record by transcribing those notes as much as possible, and soliciting the aid of the attorneys and judge who tried the case. This all occurred after there had been a proper petition for a free transcript; Medberry has never even gotten that far, let alone explored the possibility of receiving help from the attorneys and judge who originally tried the case. And the supplementary part of the record which we filed in this case at the time it was in the lower federal courts shows that there are at least some parts of the original trial record available. Of course, the summary letters from the clerk of the court never mentioned these parts. How much more could be uncovered if a petition were properly presented is unknown.

III.

DOES A FEDERAL COURT HAVE THE AUTHORITY TO ORDER A STATE COURT TO COMPLETELY DISREGARD ITS OWN ESTABLISHED PROCEDURES (WHICH COULD BE USED TO AFFORD THE SAME RELIEF DECREED BY THE FEDERAL COURT) AND ORDER THAT SUCH RELIEF BE SOUGHT IN THE STATE COURTS IN A MANNER UNKNOWN TO THAT STATE'S JUDICIAL SYSTEM?

It is our position that, even if all of Medberry's contentions on the facts were correct, and even if he had completely exhausted his state remedies, there still is no authority for the order which was handed down by the United States District Court and which (except for a slight variation in the time allowed Colorado to comply with the various alternatives) was affirmed by the United States Circuit Court of Apeals. That order says that, if Medberry applies (within thirty days of such order) to the Colorado Supreme Court for an appellate review, within eight months:

> "(1) He shall be provided with a transcript (including the testimony adduced at the trial) or other adequate means of appeal and be granted an appeal based thereon, or
>
> (2) he shall be given a new trial, or
>
> (3) failing both of the above, he shall be discharged from custody by the respondents."

There is no provision whatever in Colorado procedure for applying "for an appellate review by the Colorado

Supreme Court" and then being "provided with a transcript" (which transcript the same opinion also finds to to be non-existent). We have already pointed out that in Colorado the way to obtain a free transcript is to petition for such in the district court, and that the lower court appeared to feel that Medberry had exhausted his state remedies even though he had never done that; he only brought repeated writs of habeas corpus which were summarily answered, in effect, by "not the proper remedy", and which never even raised the question of whether or not Medberry should now be given a free transcript.

Now, we come to another method by which the United States District Court suggests Medberry can be provided with a free transcript apply to the Colorado Supreme Court for appellate review and be provided with one. There is no more basis for this procedure in Colorado than there was for trying to use habeas corpus. If the United States District Court had any authority at all along this line, it would have to be to order Medberry to follow *In re Patterson*, supra, as he had been told previously and with which Medberry still hasn't complied, and petition for a free transcript in the local Colorado District Court that originaly tried Medberry.

Of course, if Colorado had no procedure at all by which Medberry could obtain the rights guaranteed by the Federal Constitution, the federal courts would no doubt have the authority to decree that Colorado follow a procedure previously unknown in this state in order that Medberry might gain those rights. However, we know of no authority that would allow a federal court to institute a whole new proceeding (obtaining transcripts from the Supreme Court) when the state a ready has a procedure

(petitioning for a transcript in the local courts) which would just as well protect all of Medberry's rights if he would only use it.

CONCLUSION

This case presents most important questions regarding the circumstances under which federal courts may intervene in state criminal procedure and possibly cause the release of one whose conviction for first degree murder has been upheld by the highest court of the state. It is sincerely urged that this petition be granted in order that this court may provide answers to the urgent questions hereby presented and thereby clarify the relevant responsibilities of the State of Colorado and other states faced with the same or a similar situation.

Respectfully submitted,

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Attorney General,

FRANK E. HICKEY,
Deputy Attorney General,

J. F. BRAUER,
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104 State Capitol,
Denver, Colorado.

Counsel for the Petitioners.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 6789

IN THE MATTER OF THE PETITION OF ELLSWORTH MEDBERRY, Petitioner,

vs.

WAYNE K. PATTERSON, Warden of The Colorado State Reformatory and HARRY C. TINSLEY, Warden of The Colorado State Penitentiary, Respondents.

Filed, United States District Court, Denver, Colorado, Aug. 31, 1960, G. Walter Bowman, Clerk

Mr. Samuel D. Menin, Esq., University Building, Denver 2, Colorado, for the Petitioner; and Messrs. Duke W. Dunbar, Attorney General, State of Colorado, Frank E. Hickey, Deputy Attorney General, and J. F. Brauer, Assistant Attorney General, 104 State Capitol, Denver 2, Colorado, for the Respondents.

MEMORANDUM OPINION AND ORDER

ARRAJ, Chief Judge.

This matter comes before the Court on a petition for a writ of habeas corpus on the grounds that petitioner's imprisonment is in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment in that he was denied adequate legal representation and an adequate appellate review.

This is the third time petitioner has sought relief in this Court. The Memorandum Opinion and Order filed in connection with the second petition and reported in 174 Fed. Supp. 720 should be read in connection with this Opinion and Order.

On June 24, 1939, petitioner was convicted of first degree murder in the District Court in Washington County, Colorado. A motion for new trial was filed alleging thirty-five grounds of error. This motion was denied and petitioner was sentenced to life imprisonment.

Subsequently, on October 13, 1939, the attorneys who had represented Medberry at his trial withdrew their appearance and John E. O'Brien, a member of the Wisconsin Bar but not of the Colorado Bar, entered his appearance for petitioner. Various motions by petitioner for appointment of counsel familiar with Colorado criminal procedure were denied. On October 14, 1939, petitioner's supplemental motion for a new trial or a writ of error coram nobis was denied. Following these rulings "petitioner requested the Court to order the preparation of a transcript of the evidence and proceedings in the trial court at public expense to enable defendant to procure a review of the judgment of conviction." Medberry v. People, 107 Colo. 15, 17-18. This motion too was denied. Thereafter, upon a suggestion of Medberry's indigency, he was permitted to docket his proceeding in error in the Colorado Supreme Court without prepayment of fees and to submit his case on typewritten abstract and briefs. A writ of error was issued on December 18, 1939. A request for a free transcript of the trial proceedings was also made in petitioner's brief before the Colorado Supreme Court. The Colorado Supreme Court denied the free transcript and affirmed Medberry's conviction. Only

five issues were presented to and decided by the Colorado Supreme Court, the petitioner contending that lack of a transcript prevented him from arguing other errors alleged to have been committed during the trial. Petitioner did not seek a writ of certiorari from the United States Supreme Court.

Nothing further transpired in the case until petitioner applied in this Court for a writ of habeas corpus which was denied on August 13, 1958, for failure to exhaust state remedies. Petitioner then filed an original petition for habeas corpus in the Colorado Supreme Court which was denied on September 18, 1959, without written opinion. Rehearing was also denied without written opinion. Certiorari from the United States Supreme Court was denied on January 12, 1959. 358 U. S. 932.

Medberry then, on February 4, 1959, again applied for a writ of habeas corpus in this Court. This Court, in a written opinion, Medberry v. Patterson, U.S.D.C., Colo., 174 F. supp. 720, denied the application pointing out that petitioner had further remedies that he could pursue in the Colorado Courts. That opinion indicated that petitioner could proceed by way of petition for a writ of habeas corpus to a Colorado District Court and by way of applying for a free transcript in accordance with the procedure laid down in In re Patterson, 136 Colo. 401. It was further suggested that the Colorado Courts should be given an opportunity to reconsider Medberry's case in the light of Griffin v. Illinois, 351 U. S. 12.

After this Court's decision in Medberry v. Patterson, *SUPRA*, petitioner applied for a writ of habeas corpus in the District Court of Washington County, State of Colorado. Judge Wilbert Schauer of that Court held a

hearing on the petition and denied the petition setting forth his findings on the matter. Petitioner appealed to the Colorado Supreme Court which affirmed, Medberry v. Patterson, — Colo. —, 350 P.2d 571, the denial of the writ of habeas corpus on the ground that habeas corpus was not the proper remedy under Colorado law; there were no rulings on the specific findings of Judge Schauer.

The case is now before this Court on an application for a writ of habeas corpus filed May 9, 1960. A full hearing on all the issues involved in this case was held on July 14, 1960. The Court has had before it and has, under an agreement of the parties, given consideration to the files and records of the previous habeas corpus cases filed in this Court by the petitioner and to the records in the Colorado Supreme Court involving this petitioner.

The first question that must be determined is whether Medberry has exhausted his state remedies, thus meeting the requirements of 28 U.S.C. Sec. 2254. This Court must now hold that he has.

In 1940 Medberry attempted to secure a transcript so as to obtain a full appellate review of his trial and conviction. The argument that he did not exhaust his remedies since he did not seek certiorari from the United States Supreme Court at that time was adequately dealt with in Medberry v. Patterson, U.S.D.C., Colo., 174 F. Supp. 720, 726.

It does not appear and the respondents do not contend that the writ of coram nobis is an available remedy. See Litchfield v. Tinsley, 10 Cir., — F. 2d —, Kirk v. Best, 123 Colo. 127, 130-131.

Medberry has clearly complied with the suggestion in Medberry v. Patterson, U.S.D.C., Colo., 174 F. Supp. 720 that he attempt to obtain a writ of habeas corpus in a district court of Colorado. The denial by the district court was affirmed by the Colorado Supreme Court on the ground that habeas corpus is not an appropriate remedy under Colorado law for challenging the denial of a free transcript. This is an adequate state ground and exhaustion of state remedies does not require aplication for and denial of certiorari by the United States Supreme Court when the state decision was based on an adequate state ground. Medberry v. Patterson, U.S.D.C., Colo., 174 F. Supp. 720, 726; Wade v. Mayo, 334 U. S. 672; White v. Pagen, 324 U. S. 760.

The issues thus narrow to whether in order to exhaust his state remedies Medberry should now apply for a free transcript or whether by failing to ask for a new appellate review and free transcript before January 1 1957, (the significance of this date will appear later) he failed to comply with Colorado's procedural requirements for an available remedy and thereby waived any Constitutional rights he may have possessed.

In dealing with either of these alternatives it is necessary to determine whether a second appeal is available to Medberry under Colorado law. If a second appeal is available he has not exhausted his state remedies. If it is not he has exhausted his state remedies.

This Court finds nothing in Colorado law that would allow Medberry a second appeal to the Colorado Supreme Court. Both respondents' brief and the Court's opinion in

Medberry v. Patterson,—Colo.,—, 350 P. 2d 571, make it clear that Colorado considers that Medberry has had his appellate review. The general rule is that there can be no second appeal. 24 C.J.S., Criminal Law, Sec. 1633, p. 228 and cases there cited. The opinion in Medberry v. Patterson,—Colo.—, 350 P. 2d 571, shows that no second appeal is available. The Court there said that the remedy was to have sought certiorari in the United States Supreme Court from the affirmance of his conviction. No mention is made of a second appeal to the Colorado Supreme Court as a possible remedy. And respondents in their brief in regard to an application for a free transcript of the last Medberry proceeding in state courts say that no second review is available under the rules. This Court finds no reason to believe that the same rule would not apply to a second appeal of Medberry's 1939 conviction. Certainly here, as in Dowd v. Cook, 340 U. S. 206, 209, there is no indication that Medberry could have a second appeal *as of right*. Apparently under that decision a remedy less than an appeal as of right is one which does not have to be exhausted. This Court must therefore conclude that no new appeal of Medberry's conviction is available in the Colorado Courts.

With this in mind we turn to the respondents' argument that in order to exhaust his state remedies Medberry must again apply to the Colorado Courts for a free transcript under In re Patterson, 136 Colo. 401.

The opinion of In re Patterson, *supra*, points out that one is not entitled to a transcript if it would be a "vain and useless thing." See Kirkendoll v. People, 138 Colo. 267. This is in conformity with the concurring opinion of Mr. Justice Frankfurter in Griffin v. Illinois, 351 U. S. 12,

24, in which it is pointed out that a state may protect itself from subsidizing frivolous appeals. Clearly, giving Medberry a free transcript for purposes of an adequate appellate review would be a "vain and useless thing" when no further appellate review is available. Therefore, it seems inescapable that the Colorado Courts would properly under In re Patterson, supra, deny Medberry a free transcript on the ground that it would be a vain and useless thing.

Before considering further the legal aspects of this question the factual situation should be narrowed. A certified copy of a letter of January 11, 1957, from the Clerk of the District Court of Washington County to Medberry shows that no transcript was available. The respondents in their "Answer and Return to Order to Show Cause" in Medberry v. Patterson, Civil No. 6133, in this Court said that "upon information and belief the respondents believe that the reporter's transcript of the proceedings in the Washington District Court are no longer available." And the Colorado Supreme Court in Medberry v. Patterson, —Colo.—, 350 P. 2d 571, pointed out that it is "apparent that a bill of exceptions cannot now be obtained." No evidence to the contrary has been produced. Therefore, it is the finding of this Court that no transcript is now available.

Since no transcript is available, it would be a futile gesture insofar as obtaining a transcript is concerned to apply for a free transcript in the Colorado Courts. But respondent argues that when the transcript is found to be unavailable the state Courts should be allowed to decide what the remedy is in such situation and consequently bringing the action in state court rather than federal court does have a purpose and is not futile. This reasoning

might be persuasive if an application for a transcript by Medberry would result in a disposition of Medberry's case on its merits in the Colorado courts.

As explained above, the Colorado Courts would properly deny the application as a vain and useless thing and so would have no more reason to determine what to do when a transcript was unavailable than they had when the last writ of habeas corpus was presented to the Colorado Courts and was denied with no consideration given to the remedy for unavailability of a transcript.

Furthermore, it is extremely doubtful that in an application for a transcript at the present time Medberry could raise the point of the violation of his Constitutional rights in 1939 and 1940 so that he could have the Colorado Courts decide whether in 1939 and 1940 he was indigent and failed to receive an adequate appellate review. The Colorado Courts, on aplication for a free transcript would be obliged only to decide if petitioner is presently entitled to a free transcript.

In addition, a reading of the Colorado Supreme Court's opinion in Medberry v. Patterson,—Colo.—, 350 P. 2d 571, along with the opinions in Griffin v. Illinois, 351 U. S. 12, and Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U. S. 214, leads to the conclusion that petitioner could not in the Colorado Courts invoke the Griffin and Eskridge cases in applying for a transcript. A considerable portion of the opinion of the Colorado Supreme Court is used to distinguish Medberry's case from the Eskridge case and presumably from the Griffin case. One, such as Medberry, as to whom no transcript is available, whose indigency was a "debated matter," and who could not set out some fact showing the

probability of error is not entitled to relief in Colorado under the Eskridge decision. Medberry v. Paterson,— Colo.—, 350 P. 2d 571. Any doubts about the availability to Medberry of a remedy under In re Patterson were laid to rest by the decision in Medberry v. Patterson, — Colo. —, 350 P. 2d 571. Thus, application for a transcript is not an available, effective remedy in the Colorado Courts under the facts of Medberry's case.

Having concluded that no new appeal of Medberry's conviction is available, it must, therefore, follow also that there was no failure to comply with Colorado's procedural requirements for obtaining an available remedy which failure would have constituted a waiver by Medberry of his Constitutional right to a transcript and an adequate appellate review. See Brown v. Allen, 344 U. S. 443, 484-487; Litchfield v. Tinsley, 10 Cir.,—F. 2d —. It is not disputed that a transcript was requested in an acceptable way before the 1940 appeal. It was refused and there was then no possible need for further action by Medberry until the United States Supreme Court decision in Griffin v. Illinois on April 23, 1956.

It may be argued that after Griffin v. Illinois, Medberry had until January 1, 1957, to ask again for a transcript and for a new appeal under the Griffin decision and the Colorado rule limiting the time within which to apply for writ of error (See Johnson v. People, — Colo. —, 344 P. 2d 181; Litchfield v. Tinsley, 10 Cir.,—P. 2d —.) and that his failure to do so was failure to comply with Colorado's procedural requirements for an available remedy.

Whether the January 1, 1957, deadline applies to those convicted before April 15, 1955, is subject to considerable

doubt. See Johnson v. People,—Colo.—, 344 P. 2d 181. If Medberry has an unlimited time within which to ask for a transcript and second appeal then he has not failed to comply with Colorado's procedural requirements and cannot be said to waive his rights by not now asking for a transcript and appeal when he has knowledge that no transcript is available. Waiver must be intelligent. Johnson v. Zerbst, 304 U. S. 458, 464-465; Dooling v. Overholser, D. C. Cir., 243 F. 2d 825. Failure to do a futile thing is not intelligent waiver.

A somewhat closer question is presented if the deadline of January 1, 1957, does apply to those convicted before April 15, 1955, including Medberry. This Court is still, however, of the opinion that there has been no waiver or failure to meet procedural requirements for an available remedy. The cases in which the Courts have found waiver have been those in which the defendent neither asked for an appeal nor aplied for a transcript prior to January 1, 1957. Medberry asked for both in 1939-1940 and received only a review of points requiring no transcript for decision.

Moreover, the evidence indicates that no transcript of the evidence has been available for many years. It is seriously doubted that one can waive a right to a transcript when it was impossible to have obtained it.

And most importantly, since no new appeal is available and since Medberry has no right to a transcript in the absence of an appeal for which it is necessary, Medberry did not fail to comply with Colorado's procedural requirements for aplying for a transcript and appeal. No procedure was or is available for obtaining either transcript or appeal.

Furthermore, that one does not need to apply for a transcript and new appeal before applying for federal habeas corpus seems clearly indicated in the decision in Eskridge v. Washington State Board of Prison Terms and Paroles, *supra*.

Therefore, our conclusion must be that there was no failure to exhaust state remedies because of waiver or failure to comply with the procedural requirements for an available remedy.

Consequently, Medberry has, on coming to this Court for the third time, exhausted his state remedies and is entitled to have his case considered on its merits by this Court.

We may first dispose of petitioner's contention that he was denied adequate legal representation. The Court resolves that point against petitioner on the grounds set forth in Medberry v. Patterson, U.S.D.C., Colo. 174 F. Supp. 720.

We turn then to the issue of whether Medberry was denied an adequate appellate review unconstitutionally.

If during the appeal from his conviction Medberry was indigent and his indigency prevented him from obtaining a transcript of his trial proceedings and the lack of such transcript prevented him from receiving an adequate appellate review, then he is imprisoned in violation of the Fourteenth Amendment. Griffin v. Illinois, 351 U. S. 12; Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214; In re Patterson, 136 Colo. 401.

And he would, therefore, be entitled to relief. 28 U.S.C. Sec. 2241 (c) (3).

In the habeas corpus proceeding in the District Court of Washington County, Judge Schauer made specific findings in denying the writ and we might well have been able to follow them if the highest court of the state had considered and affirmed those findings. Brown v. Allen, 344 U.S. 443, 465; Gay v. Graham, 10 Cir., 269 42d 482. Since this was not done, however, it is necessary for this Court to make its own findings of fact.

The first essential factual question is whether Medberry was indigent at the time of his appeal in 1939 and 1940. This Court finds that he was. During the hearing before this Court Medberry testified that he had no money during the entire trial and appeal period. He testified further that his parents furnished the money for his trial attorneys and for an attorney from Wisconsin to come to Colorado for post-trial proceedings. In the record on appeal in the Colorado Supreme Court are affidavits of Medberry and his parents of his and their indigency at the time for appellate proceedings. The parents' affidavit said that "they have sold their home and liquidated insurance policies and borrowed all the money they have been able to. . ." and ". . . are without further means to . . . furnish funds to aid in the defense of said defendant." There is no evidence contradicting any of the above. In an opinion during the post-trial proceedings the trial judge spoke of Medberry's "rendering himself or rendering his parents destitute of money or property with which to further finance his appeal to the Supreme Court. . ." This, although not a direct finding, along with the Colorado Supreme Court's allowing petitioner to proceed in forma

pauperis "upon the suggestion of the indigency of defendant" lends support to the evidence showing indigency.

The evidence does show that $2,500.00 was spent for Medberry's trial attorneys and $667.00 was spent for Mr. O'Brien's conducting post-trial proceedings. Respondents argue that the failure to save sufficient money to finance his appeal was unwise and precludes a finding of indigency. No evidence was presented by respondents indicating that the money spent was an unreasonable amount for competent counsel in a case as important and involving as much effort as did Medberry's. It is the Court's finding that the money shown to be available to be spent on Medberry's behalf was reasonably spent.

A letter from one of the trial attorneys to Medberry's parents, which letter was part of the record in the Colorado Supreme Court in the original case, shows that the total cost of appeal, including seven or eight hundred dollars for a transcript, would have been approximately $2,000.00. No evidence indicates how the appeal could have been reasonably accomplished.

Moreover, the money used was furnished by his parents. The record shows that Medberry had reached his majority before these proceedings. Certainly the parents were free to spend their own money as they saw fit. This Court finds no case, and respondents cite none, suggesting that this defendant must be found not to have been indigent if his parents might have spent their money more wisely.

Therefore, this Court finds that Medberry was indigent during the time of his appellate proceedings for the purpose of being entitled to a free transcript under the Griffin and Eskridge decisions.

The second essential factual question is whether lack of a transcript deprived Medberry of an adequate appellate review. This question must be answered affirmatively. After conviction a motion for new trial was filed alleging thirty-five grounds of error. An examination of the motion for new trial shows that approximately twenty-five of the grounds would require a transcript of the evidence for full consideration. The motion for new trial raised questions of the sufficiency of the evidence, whether there was evidence justifying the giving of certain instructions, whether errors in the admission or exclusion of evidence occurred and whether there was newly discovered evidence justifying a new trial. The conclusion that a transcript was necessary is supported by the original trial judge in his "Ruling on objections to proposed Bill of Exceptions where he described the Bill of Exceptions" as "but a transcript of only a very meager portion of the case entitled People v. Medberry, and wholly inadequate to put before an appellate court as a record upon which said court could intelligently pass or act." The Colorado Supreme Court in Medberry v. People, 107 Colo. 15 described petitioner's record on error as "excerpts from the records of the case filed in the office of the clerk of the district court and a transcript of the various pleadings and proceedings subsequent to the appearance of Mr. O'Brien in the case, together with copies of letters passing between court and counsel and newspaper accounts of the trial". This Court has examined the record that was before the Colorado Supreme Court in 1940 and finds it to be inadequate for purposes of full appellate review.

The respondent urges that petitioner should have set out here the specific errors which were allegedly committed in the original trial. There is nothing in the Griffin

or Eskridge cases that indicates that one is precluded from relief if one cannot remember the details of trial error after twenty years. Petitioner's allegation that "considerable errors were committed at the trial, and had he been accorded an 'adequate appellate review'. . . the verdict of guilty of murder would have been set aside" is sufficient in this instance. With a transcript available petitioner could pin-point the alleged errors.

The Court, therefore, finds that because of lack of a transcript, Medberry was not accorded an adequate appellate review within the requirements of the Griffin and Eskridge decisions. Consequently, it is the conclusion of this Court that petitioner was denied his rights to due process and equal protection under the Fourteenth Amendment.

A transcript is not required in every case but Colorado must provide by some means an adequate appellate review. Griffin v. Illinois, 351 U. S. 12.

Under 28 U.S.C. Sec. 2243 the Court must "dispose of the matter as law and justice require." The authority of this Court to provide alternatives to release is clear. Dowd v. Cook, 340 U.S. 206; O'Brien v. Lindsey, 1 Cir. 202 F. 2d 418; Westbrook v. Randolph, 7 Cir., 259 F. 2d 215.

It is, therefore, the Judgment and Order of this Court that if within thirty days from the date of this order the petitioner applies for an appellate review by the Colorado Supreme Court of his trial and conviction, then within eight months from the date of this Order petitioner shall be accorded one of the following three alternatives:

(1) He shall be provided with a transcript (including the testimony adduced at the trial) or other adequate means of appeal and be granted an appeal based thereon, or

(2) he shall be given a new trial, or

(3) failing both of the above, he shall be discharged from custody by the respondents.

If petitioner does not apply for an appellate review within thirty days, he shall remain in the custody of respondents, and respondents will not be obliged to comply with the alternatives above set forth.

Dated at Denver, Colorado, this 31st day of August, A.D. 1960.

BY THE COURT:

/s/ Alfred A. Arraj

Alfred A. Arraj, Chief Judge
United States District Court

EXHIBIT B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6594 -- March Term, 1961

Wayne K. Patterson, Warden of the Colorado State Reformatory, and Harry C. Tinsley, Warden of the Colorado State Penitentiary, Appellants, v. Ellsworth Medberry, Appellee	Appeal from the United States District Court for the District of Colorado.

(May 4, 1961)

Robert G. Pierce and J. F. Brauer, Assistant Attorney Generals, Denver, Colorado, (Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, Denver, Colorado, were with them on the brief) for Appellants.

Samuel D. Menin, Denver, Colorado, for Appellee.

Before MURRAH, Chief Judge, PICKETT, Circuit Judge, and SAVAGE, United States District Judge.

PICKETT, Circuit Judge.

The issue presented in this habeas corpus proceeding concerns the effect of the due process and equal protec-

tion clauses of the 14th Amendment to the United States Constitution when a state refuses to supply an indigent defendant a free transcript of the trial proceedings necessary for an adequate review of a conviction in a murder case.

Medberry was convicted of murder in the first degree in June, 1939. He filed a motion for a new trial alleging numerous errors in the trial of his case, an apellate review of which would require a transcript of the trial proceedings. The motion was overruled, and Medberry was sentenced to life imprisonment. He was represented in the trial of the case by attorneys of his own choice who withdrew shortly after the trial. A Wisconsin attorney then appeared for Medberry. There was a timely notice of appeal, and the trial court denied a request, premised upon a showing of indigency, that a transcript of the trial proceedings be furnished at public expense. The conviction was affirmed on a record which did not contain a reporter's transcript of the trial proceedings. The Colorado Supreme Court held that the allowance of a free transcript in such cases was within the discretion of the trial court, which discretion had not been abused. Medberry v. People, 107 Colo. 15, 108 P. 2d 243. In considering the appeal, the Colorado court assumed that at the time of his conviction, Medberry did not have sufficient funds to purchase the necessary transcript.[1]

Since 1958 Medberry has been in and out of the state and federal courts in different habeas corpus proceedings

[1] The Federal District Court in this case made a finding supported by substantial evidence that Medberry was indigent at the time of his appeal in 1939 and in 1958. Medberry v. Patterson, 189 F. Supp. 557, 563.

in which he sought his release or a new appellate review with an adequate transcript of the trial evidence. He first brought habeas corpus proceedings in the United States District Court for the District of Colorado. The writ was denied on the ground that his state remedies had not been exhausted. An original petition for writ was then filed in the Supreme Court of Colorado, and denied without opinion. Certiorari to the United States Supreme Court was also denied. Medberry v. Patterson, 358 U.S. 932. A second application for a writ was denied by the United States District Court for the District of Colorado on the ground that the state district court had jurisdiction of the merits of Medberry's claims. Medberry v. Patterson, 174 F. Supp. 720. At the suggestion of the United States District Court for the District of Colorado, further proceedings were instituted in the state district court where Medberry had been convicted. Relief was denied there, and the judgment was affirmed on appeal. Medberry v. Patterson, __ Colo. __, 350 P.2d 571. Medberry's perseverance culminated with a judgement in the instant case, which provided that if he applied for an appellate review of his conviction within thirty days, then, within eight months, he should be given one of these alternatives: "(1) * * * a transcript (including the testimony adduced at the trial) or other adequate means of appeal and be granted an appeal based thereon, or (2) * * * a new trial, or (3) failing both of the above, he shall be discharged from custody by the respondents." Medberry v. Patterson, 188 F. Supp. 557, 564

It is now settled that if state statutes provide for appeals from convictions in criminal cases, the due process and equal protection clauses of the 14th Amendment require that the right shall not be limited to those who are

able to afford the expense of an appeal. Smith v. Bennett, —U. S.— ; Burns v. Ohio, 360 U. S. 252. As applied to this case, this means that the state, upon a timely request, must furnish an indigent defendant in a criminal case with a record on appeal which is sufficient for an adequate appellate review of his conviction. Griffin v. Illinois, 351 U. S. 12.[2] If the state has refused to furnish the free transcript to which an indigent defendant is entitled, the taking of an appeal on a record which is not sufficient for adequate appellate review does not destroy that right. When a timely demand has been made, delay in seeking relief from the denial of the right to a transcript does not defeat that right. In Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U. S. 214, the defendant was convicted of murder in a Washington State Court in 1935, and sentenced to life imprisonment. He gave timely notice of appeal to the Supreme Court of the State, but was unable to obtain a review because of the state's failure to furnish a free transcript. In 1956 Eskridge instituted habeas corpus proceedings in the Supreme

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[2] In Griffin v. Illinois, 351 U.S. 12, 18, the court said:

"All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial portion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a distinction is a departure in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (Footnote omitted)

Court of Washington, alleging as ground for the writ, that he had not been furnished a free transcript for the purpose of an appeal from his conviction. His petition was denied without opinion. The judgment of the Washington Supreme Court was reversed upon the principle that the failure to furnish Eskridge with a transcript for appeal purposes was a denial of his constitutional rights guaranteed by the 14th Amendment. The case was remanded for further proceedings.

We are of the opinion that Medberry's case falls squarely within the rule of the Griffin, Eskridge and Burns cases, and that Medberry has exhausted his remedies in the state court. In his last appeal the Supreme Court of Colorado held that the relief he sought was not available in Colorado habeas corpus proceedings.[3] No federal question having been considered, a petition for certiorari to the United States Supreme Court was not necessary in order to exhaust state remedies. Wade v. Mayo, 334 U. S. 672; White v. Ragen, 324 U. S. 760, 765. While it is unfortunate that at this late date the State of Colorado will be confronted with releasing one convicted of murder, or with the difficult but not insurmountable task of retrying him,[4] yet, as said in the Griffin case, it is traditional in our system of government that "constitutional guarantees of due process and equal protection both call for procedures in criminal cases which allow no

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[3] In Medberry v. Patterson, 350 P.2d 571, 574, the court quoted from McKenna v. Tinsley, 141 Colo. 63, 346 P.2d 584, as follows: "'It is plain that the denial of a request for a free transcript, even if timely made, * * *, does not afford a basis for the issuance of a writ of habeas corpus. Petitioner neither attacks the jurisdiction of the court nor the sentence imposed upon him . . .'"

[4] The record is clear that no transcript of the trial proceedings was made, and one is not now available

invidious discriminations between persons and different groups of persons."

The judgment is affirmed and the time for compliance therewith is extended to six months from the date of the issuance of the mandate herein.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 263

WAYNE K. PATTERSON, Warden of the Colorado State Reformatory, and HARRY C. TINSLEY, Warden of the Colorado State Penitentiary,
Petitioners,

vs.

ELLSWORTH MEDBERRY, Respondent.

PETITION FOR REHEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 263

WAYNE K. PATTERSON, Warden of the Colorado State Reformatory, and HARRY C. TINSLEY, Warden of the Colorado State Penitentiary, Petitioners,

vs.

ELLSWORTH MEDBERRY, Respondent.

PETITION FOR REHEARING

COMES NOW Duke W. Dunbar, Attorney General of the State of Colorado, and shows unto this Court:

1. That on October 9, 1961, this Court denied the State of Colorado's petition for certiorari in *Patterson, et al. v. Medberry*, No. 263, October Term, 1961. On the same date, Mr. Justice Harlan filed a memorandum relative to the case.

2. That the memorandum first points out that two important issues are involved in the case. The first is

relative to a federal district court's entitlement to re-examine a state court's finding on indigency which it was said was ripe for consideration. The second involves the necessity of a retroactive application of the *Griffin* rule in circumstances where the state, without fault on its part, is presently unable to supply petitioner with a trial transcript or otherwise to satisfy the *Griffin* rule. Mr. Justice Harlan, after assuming that the lower court was correct in its finding that the state was now unable to provide a transcript, went on to note that the denial of certiorari "will not of course preclude the state from showing below, if it can, that without fault on its part it is now unable to afford petitioner other adequate means of appeal and from further recourse to this court, if necessary, with respect to either or both of the above questions."

3. That we are somewhat at a loss to know how the state here, under the authority of *Brown v. Allen*, 344 U. S. 443, would again have access to a lower federal court for the purpose of showing that without fault on its part it is now unable to afford the prisoner other adequate means of appeal.

4. That the State of Colorado is here seeking certiorari of a United States Circuit Court of Appeals decision, 290 F. (2d) 275, which affirmed a United States District Court judgment based upon a memorandum opinion and order which contained the following language:

> "After conviction a motion for new trial was filed alleging thirty-five grounds of error. An examination of the motion for new trial shows that approximately twenty-five of the grounds would *require a transcript of the evidence* for full consideration. The motion for new trial raised questions of the sufficiency of the

evidence, whether there was evidence justifying the giving of certain instructions, whether errors in the admission or exclusion of evidence occurred and whether there was newly discovered evidence justifying a new trial. The conclusion that *a transcript was necessary* is supported by the original trial judge * * *.

"The respondent urges that petitioner should have set out here the specific errors which were allegedly committed in the original trial. There is nothing in the Griffin or Eskridge cases that indicates that one is precluded from relief if one cannot remember the details of trial error after twenty years. Petitioner's allegation that 'considerable errors were committed at the trial' * * * is sufficient * * *. *With a transcript available* petitioner could pin-point the alleged errors.

"The Court, therefore, finds that because of lack of a transcript, Medberry was not accorded an adequate appellate review * * *." (Emphasis supplied)

Medberry v. Patterson, 188 F. Supp. 557, 564.

5. That since the above language is contained in the opinion of the District Court to support the judgment, the affirmance of which we now seek to have reviewed in this court by certiorari, and since such language clearly indicates a finding to the effect that nothing short of a complete transcript could be considered a sufficient basis on which to expect the prisoner to acquire an adequate appellate review, we respectfully submit that it would be a vain and useless thing to now attempt to make a showing to that very same court to the effect that the prisoner can obtain a proper writ of error based on something other than the complete reporter's transcript.

6. That it is to be noted that to our knowledge the best notes of the trial and account of the proceedings therein, other than the official reporter's notes, were kept by newspaper reporters who daily attended the trial and wrote up their notes in the form of press releases. These would appear to be a somewhat accurate record of the trial, but the opinion on which was based the judgment which we have sought to have reversed in the United States Circuit Court of Appeals and in this Court stated that the appeal which the prisoner already has had, based upon those newspaper accounts, was an adequate appellate review on only those points which required no reporter's transcript to consider. That opinion, as can be seen from the quotation above, also says, in effect, that the prisoner does not have to now submit assignments of error or other list of alleged errors in order to assist the state to better reconstruct, without a reporter's transcript, the parts of the trial that the prisoner might now wish to have reviewed in a new and adequate appeal of the many points inadequately considered in the original appeal.

WHEREFORE, it is respectfully submitted that the only lower federal court to which the State of Colorado could go to make the showing referred to in Mr. Justice Harlan's memorandum has already decided that the only alternative materials here available are not a sufficient basis for an adequate appellate review, and that only a complete transcript could here afford the prisoner the complete appellate review to which he is entitled. (Any indication to the contrary apparently listed in the conditional release order must be considered an unreal and unworkable alternative).

It is hereby certified that this petition for rehearing is presented in good faith and not for delay and is restricted

to the grounds above specified. It is further requested that, in view of the fact that the six months period during which Colorado must act upon one of the alternatives, such as a retrial (if it is to avoid releasing this man under the present decision of the Tenth Circuit Court of Appeals), expires December 8, 1961, that this Court now extend such time period to a date ninety days subsequent to its determination regarding this petition for rehearing in order to provide adequate time to attempt a retrial in the Colorado courts or to obtain final determination by this Court on certiorari.

Respectfully submitted,

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